IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 11599 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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INDUBEN C BAROT

Versus

CHIEF OFFICER,

Appearance:

1. Special Civil Application No. 11599 of 2000
MR KAVINA with MR NIRAJ V ASHAR for Petitioner
M/S.VYAS ASSOCIATES for Respondent No. 1
MRS BR GAJJAR, AGP for Respondent No. 2 & 3.

CORAM : MR.JUSTICE K.M.MEHTA

Date of decision: 02/08/2001

ORAL JUDGEMENT

1. Induben C.Barot widow of late Shri Chandulal J.Barot, petitioner, has filed this petition praying for a writ of mandamus or any other appropriate writ or order directing the Chief Officer, Bagasara Nagarpalika, Amreli respondent No.1 herein and the Collector, Dist.Amreli respondent No.2 herein to pay to the petitioner a sum of Rs.2,23,870/- with interest the rate of 18% p.a. from 30.11.1998 till the date of payment. The petitioner

further prayed that the respondents be directed to pay a sum of Rs.50,000/- as damages and cost to the petitioner for not releasing the legitimate dues of the deceased.

2. The facts giving rise to this petition are as under:-

2.1 Induben C.Barot-petitioner is a wife of deceased Shri Chandulal J.Barot. The deceased was appointed as typist in the Town Development Department of Bagasara Nagar Palika on 1.5.1963. The respondent No.1 is the Chief Executive Officer of the said Nagarpalika. The deceased was appointed as Typist by order dated 1.5.1963 pursuant to the Resolution No.3 of the Staff Committee of the Bagasara Nagarpalika. The copy of the said order has been annexed at Annexure `A' to the petition.

2.2 It has been stated that the deceased performed his services efficiently and without any complaint of the respondent No.1 and obtained several promotions from time to time. In 1982 the deceased was promoted as Senior Clerk. The copy of the order dated 12.2.1982 is produced at Annexure `B' on page 13 of the petition. He was further promoted to the post of Head Clerk which post the deceased occupied till the date of superannuation. The deceased was promoted to the post of Head Clerk vide Resolution No.58 dated 20.10.1995. The copy of the said order has been produced at Annexure `C' on page 15 of the petition.

2.3 It has been stated that deceased was performing his duties with respondent No.1 without any complaint. The deceased has never been chargesheeted. The petitioner states that on reaching the age of superannuation, the service of the deceased came to an end and by order dated 12.11.98 the deceased was superannuated from service w.e.f. 30.11.1998. The copy of the said order dated 12.11.98 has been produced at Annexure `D' to the petition.

2.4 It has been stated by the petitioner that the last pay of the deceased, pursuant to the effect given to the recommendations of the Vth Pay Commission's was Rs.8164/- per month, as is evidenced from the last pay certificate. The copy of the said certificate has been produced at Annexure `E' to the petition. It has also been stated that deceased's pay was refixed as per R.O.P Rules 1998. It has been stated that after his retirement from service on superannuation, the deceased made inquiries with the respondent No.1 regarding his retirement benefits, and he was informed that his pension

case has been recommended to the Collector and that further orders from the Collector's office to the Local Fund Office approving and sanctioning the payment of pension to the deceased would have to be passed by the Collector and the Nagarpalika has done everything in its power towards providing pension to the deceased.

2.5 Thereafter it appears that due to cancer the deceased was died on 17.6.2000. After the death of her husband, the petitioner addressed a letter dated 10.8.2000 to respondent No.1 through his son stating that the pension case of the deceased has not been approved though substantial period has passed. The copy of the said representation is also annexed as Annexure `G' to the petition. As the petitioner did not receive any reply from the authority, the present petition has been filed somewhere on 14th November, 2000.

3. When the matter was placed for hearing before this Court on 15th November, 2000, this Court has issued notice. Thereafter on 12th April, 2001, when the matter was placed for hearing before this Court, this Court (Coram: P.B.Majumdar, J.) has also allowed the amendment by permitting the petitioner to join the Director of Pension as party respondent in the petition.

4. When the matter was placed for hearing before this Court on 12th April, 2001, this Court (Coram: P.B.Majmudar, J.) passed a detailed order. The operative order reads as follows:

"Under these circumstances, it is directed that, tentatively, amount of gratuity should be calculated considering the petitioner's husband's services, all throughout, on the post of Junior Clerk and on the basis of that calculation, whatever amount is required to be given, may be given on or before 20th April, 2001, because, if the said amount is paid, it cannot be said that there is any dispute so far as the aforesaid amount is concerned. So far as the rest of the questions is concerned, i.e. payment of pension and payment of difference in gratuity, if any, the same shall be decided at the time of final hearing. The respondents are directed to comply with this order immediately and to pay the aforesaid amount to the petitioner by the stipulated time. If the amount is not released, the said action will be treated as contempt of the order of this court and the responsible Officer will have to face consequence for the

same."

5. When the matter was placed for hearing before this Court, Shri P.C.Kavina, learned advocate for the petitioner appeared and has made the following submissions:

5.1 He submitted that none of the retirement dues of the deceased has been released by the respondents inspite of the said direction. He further submitted that as per the calculation, the respondents owe a sum of Rs.1,27,825/- as Gratuity payable to the deceased. This amount has not been paid by the respondents. Further, a pension arrears w.e.f. 30.11.1998 (the date of superannuation of the deceased) to 17.6.2000 (the date of death of the deceased), amounting to Rs.58,425/- has also not been paid. Similarly, after the death of the husband of the petitioner, from 1.7.2000 till 30.11.2000, sum of Rs.9,525/- is due and payable to the petitioner as Family Pension, which has also not been paid. This refusal on the part of the respondents to pay the legitimate dues of the deceased and the petitioner is illegal, arbitrary and in violation of Article 14 of the Constitution of India.

5.2 He further submitted that the respondent was supposed to pay the arrears of difference in pay and salary of the deceased which accrued due to coming into force of the Gujarat Civil Services (R.O.P.) Rules, 1998, as referred to hereinabove. This pay fixation of revised pay scale has already been granted to the deceased but the arrears are not received. Further, the arrears of higher pay scale amounting to Rs.10,000/- approx. are also not paid and withholding these payments is clearly illegal.

5.3 It was further submitted that if the pension case of the deceased had been finalised during his life time, the deceased would have opted for commutation of pension and would have received lump sum amount also. The petitioner is not in a position to give exact figures of the amount of commutation of pension and hence the petitioner craves leave to produce the same at a later date.

5.4 Learned advocate for the petitioner has relied upon the provisions of the Panchayat Act, 1962, particularly amendment of Sec.102 of the Gujarat Act VI of 1962. He submitted that the present amendment in Sec.102 is dated 15th September, 1978. The said act reads as under:

"Amendment of Section 102 of Guj.VI of 1962 :- In the principal Act, in section 102 -

(1) for sub-section (1), the following sub-section shall be substituted, namely:-

"(1)(a) Subject to the provisions of this Act and the rules made thereunder there shall be a secretary for every gram panchayat and nagar panchayat who shall be appointed in accordance with the rules:

"Provided that where on account of conversion of a municipality into a gram panchayat or a nagar panchayat under Section 307, an officer of a municipality becomes a secretary of such panchayat or where any person not being a talati-cum panchayat secretary is appointed as a secretary to such panchayat, such secretary shall not be governed by the rules so made and the rules for regulating recruitment, and conditions of service of such secretary shall be such as the panchayat may, subject to general or special order of the State Government, by its resolution determine:

Provided further that the State government having regard to the population of a gram and income of the panchayat thereof may direct in respect of a group of gram panchayats that such group shall have one secretary and thereupon there shall be one secretary for that group.

(b) A gram panchayat or, as the case may be, a nagar panchayat may subject to general or special order of the State Government, appoint such servants as may be necessary for the proper exercise of its powers, discharge of its duties and performance of its functions under this Act, and the rules for regulating recruitment, and conditions of service, of such servants shall be such as the panchayat may subject to like order by its resolution determine.

Explanation:- For the purpose of this clause the expression "servant" shall include a Secretary referred to in the first proviso to clause(a).

(c) Notwithstanding anything contained in any judgment, decree or order of any court,-

(i) the officers and servants of a gram panchayat or, as the case may be, of a nagar panchayat shall be and shall be deemed to have always been the officers and servants of such gram panchayat or nagar panchayat.

(ii) the expenditure towards the pay and allowances of, and other benefits available to, a servant of gram panchayat or, as the case may be, nagar panchayat, shall be made by that panchayat from its own fund,";

(2) in sub-section (3),-

(a) the word "other" shall be deleted;

(b) for the works "subject to rules, if any, made in this behalf" the words "subject to general or special order if any, made by the State Government, in this behalf" shall be substituted."

5.5 He submitted that the promotion to the petitioner to the post of senior clerk was dated 12th February, 1982 and, therefore, the amendment in Sec.102 inserted in 1978 clearly applies in the case of the petitioner. He has further relied upon amendment of Sec.102 of Gujarat VI of 1962 particularly clause (1)(b) which provides that a gram panchayat or, as the case may be, a nagar panchayat may subject to general or special order of the State Government, appoint such servants as may be necessary for the proper exercise of its powers, discharge of its duties and performance of its functions under this Act, and the rules for regulating recruitment, and conditions of service, of such servants shall be such as the panchayat may subject to like order by its resolution determine. He submitted that in view of this amendment it does not lie in the mouth of panchayat to say that the petitioner was no appointed on a sanctioned post.

5.6 Shri Kavina, learned advocate for the petitioner has also produced a letter dated 17.1.2000 addressed by Chief Officer, Bagasara Nagar Palika to Collector, Amreli. He has referred to Sec.102 of the Act and also amendment therein. He has referred to various orders and circulars and stated that the petitioner was appointed Head Clerk on the sanctioned post and thereafter he has been retired. The said post was created as per the Government Resolution dated 28.11.94 particularly

condition No.14 of the same and, therefore, the appointment of the petitioner was fulfilled by condition no.14 of the said resolution.

5.7 Shri Kavina, learned advocate for the petitioner further submitted that the petitioner was appointed as Senior Clerk in 1982 and thereafter promoted as Head Clerk in 1995. Now it does not lie in the mouth of the Government to say that the petitioner was not appointed as Senior Clerk particularly when from 1982 he has worked upto 1998 and thereafter he died on 17.6.2000 and when his pension papers were submitted till that neither the Collector's office nor the Audit Department has opposed for his appointment as Senior Clerk was not on the sanctioned post. However, he has relied upon the amendment of Sec.102 of the Act. He stated that as per the said amendment, necessary resolution has been passed and as per the resolution the petitioner has been appointed and, therefore, in any view of the matter, the appointment of the petitioner was legal and valid at the relevant time. He further submitted that, in any view of the matter, the action of the respondents are bad on the principle of estoppel and acquiescence particularly since 1982 the Government has not stated that the petitioner was appointed on the post which was not sanctioned post and therefore the ground of the respondents authorities that he should not be paid pension on the post that he was appointed as Senior Clerk because it was not a sanctioned post is clearly illegal and bad in law.

6. On behalf of the respondent No.1 Bagasara Nagarpalika affidavit of Shri R.M.Mirani, Chief Officer, has been filed. The stand of the Nagarpalika in their affidavit that pension papers were prepared well in time in case of the petitioner and were sent to the Collector with recommendation for sanction of the same. It was further pointed out that the Collector raised certain queries from time to time and the same were complied with by the Nagarpalika. It was further submitted that the petitioner was appointed as per the prevailing rules and therefore he was entitled to the pension however the matter is still pending with the Collector, Amreli. It was further submitted that the pension case of the petitioner has been recommended to the Collector by the respondent No.1's office but the same is pending with the office of the Collector and the respondent No.1 Nagarpalika cannot take any decision in the matter without an order being passed by the Collector's office to the Local Fund Audit and on the basis of the said order, the Local Fund Audit transfers the necessary funds to the respondent No.1 - Nagarpalika and thereafter only the respondent No.1 shall be able to make the payment of

pension to the petitioner.

7. On behalf of the respondent No.2 an affidavit of Shri R.M.Vora, District Examiner, Local Fund Audit, Amreli has also been filed. As per the affidavit, payment of Rs.77,864/- has already been made as regards gratuity amount is concerned. As regards pension is concerned it was stated that, as per the instructions of Government in Finance Department issued vide Circular No.NVT/1096/D/182.P dated 21.9.96, and as per said circular pension papers are to be taken up on hand by the respective office and the pension case requires to be sent to audit office in advance before 12 months of the date of retirement. It was further stated that on scrutiny of the case, it was found that Shri Barot had been given promotion in 1982 on the post of Senior Clerk without getting the sanction for creation of post from the Development Commissioner. So the case was returned from the Local Fund office to the Collectorate, Amreli vide letter dated 15.12.1999 with a request to send the case along with a copy of order under which the sanction for creation of post Senior Clerk if obtained from the competent officer of Government. It has been stated that only in the case of the post sanctioned by the competent authorities, pension from Government Treasury is payable and for the post created without sanction of the competent authority is not payable from the Government Treasury. It was further stated that the pension is to be fixed on the basis of pensionable pay, the pensionable pay is the average of last 10 months or 36 months basic pay (whichever is beneficial). Thus the effect of pay fixed in senior clerk scale goes in the pension, similarly the gratuity is payable on the basis of the last basic pay drawn. Hence, the effect of pay also was in calculation of gratuity. Audit can admit pension/gratuity according to rules/orders of the Government and, therefore, the order of sanction for creation of post of senior clerk from the competent authority is required in audit.

7.1 It was further submitted that promotion given without the post of Senior Clerk sanctioned in set up by the competent officer, does not make the Government liable to pay the retirement benefits from the Government Treasury. It was further submitted that after 15.12.1999 the case had not been sent to the office of respondent No.2 either along with the post sanctioning order or along with explanation and therefore this office could not proceed further without pension paper. It was further submitted that prior to 1986 the present Bagasara Municipality was Nagar Panchayat and was governed under

the Gujarat Panchayat Act, 1961. This local body has been converted into Municipality in 1986 and is governed under the Gujarat Municipalities Act, 1963. The Government vide Resolution in Urban Development and Urban Housing Department No.NPM/1094/2011.2 dated 28.11.94 has issued orders to give pensionary benefits to the employees of converted Municipality. As per Condition No.12 the pension case of such employees requires to be finalised by Local Fund Audit Office concerned who will receive the pension case through the Collector of the District. It was further submitted that as per Condition No.14 of the Government Resolution while sending the pension case to the Local Fund Audit office, the Collector has to verify that the post has been sanctioned by the competent officer. However, it was mentioned in the letter dated 8.12.1999 that the Chief Officer, Bagasara Municipality has given certificate in service book of Shri Barot to the effect that the condition no.14 is fulfilled. It was further mentioned that the pension case is to be sanctioned by Local Fund Audit office. In fact, the verification is required to be done by the Collectorate. The pension is required to be sanctioned by the officer concerned and not by audit. The audit has to check the case and issue P.P.O/G.P.O. if the case is found as per Government Rules.

8. In my view, as none of the retirement dues of the deceased has been released by the respondents, the respondents owe a sum of Rs.1,27,825/- as gratuity payable to the deceased, and further pension arrears with effect from 30.11.98 (the date of superannuation of the deceased) to 17.6.2000 (the date of death of the deceased) has also not been paid. I direct the respondent authority to pay the said amount to the petitioner widow of the deceased in this behalf. Similarly, after the death of the husband of the petitioner, from 1.7.2000 till 30.11.2000, a sum of Rs.9525/- is due and payable to the petitioner as family pension which has also not been paid. I also direct the respondent authority to pay the said amount to the petitioner in this behalf.

8.1 As this amount has not been paid to the petitioner only on technical ground that in 1982 when petitioner was appointed as Senior Clerk, it is the contention of the Government that he was not appointed on sanctioned post. In my view, this contention taken by the respondent authority is absolutely belated contention and it is clearly an after thought contention because from 1982 till petitioner has been superannuated and even he died the respondent authority has not raised this

contention in this behalf. In my view, therefore, this contention has no substance in this behalf. I, therefore, direct the respondent No.2- Collector, Amreli to pay all these amounts namely gratuity amount, pension amount and family pension all together with 12% interest from 30.11.98 the date of superannuation of deceased was effected. I also direct the respondent No.2 to pay the said amount to the widow of the petitioner by 15th October, 2001. If the respondent authority fails to pay the said amount by 15th October, 2001, then respondent authority will pay 15% interest on the said amount.

9. In view of the above directions, this petition is allowed. Rule is made absolute with no order as to costs.

(K.M. Mehta, J.)

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